

Issue: Group I Written Notice (failure to follow policy and abuse of State time);  
Hearing Date: 05/29/19; Decision Issued: 06/17/19; Agency: VDOT; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 11318; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11318**

Hearing Date: May 29, 2019

Decision Issued: June 17, 2019

#### **PROCEDURAL HISTORY**

On August 21, 2018, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy and abuse of State time.

On September 21, 2018, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 25, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 29, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant's Wife worked at a DOC Facility with a meat packing plant. On May 22, 2018, she left her home and went work. She realized she did not have enough "gas money" to drive to her parents' house to care for them if necessary. At approximately 5:30 a.m., Grievant's Wife called Grievant and told him that she had forgotten to get gas money from him before she left for work.

The Crew Leader's work shift was from approximately 7 a.m. to 3:30 p.m.

On May 22, 2018, the Crew Leader, Mr. S, and Grievant were assigned responsibility for road maintenance along several highways near the Agency's headquarters. The Crew Leader drove the State vehicle. Mr. S sat in the front seat of the vehicle. Grievant sat in the back seat. They performed their work duties on various highways until they came to a sinkhole to the side of a highway. The Crew Leader decided to stop to look at the sinkhole even though it was not one of their assigned tasks.

The Crew Leader was the supervisor with respect to the work to be performed on May 22, 2018. He was a Transportation Operator III. He could not hire or terminate employees. He directed where the crew would go and what tasks they would perform at each job site. He could determine when the crew took a lunch break or other breaks. The Agency expected Grievant to follow the instructions of the Crew Leader while working on the crew. Grievant understood he was supposed to follow the instructions of the Crew Leader.

At approximately 11:20 a.m., Grievant approached the Crew Leader and Mr. S and said there was an emergency and he needed to go to the DOC Facility. He asked the Crew Leader if they could drive to the DOC Facility since they were close to the DOC Facility. The Crew Leader wanted to help Grievant address an emergency so he decided they would drive to the DOC Facility. The men did not discuss that the trip would substitute for their lunch period.

The three men travelled approximately three or four miles to the DOC Facility. The DOC Facility included meat packing equipment. The trip took between seven and eight minutes. They arrived at approximately 11:30 a.m. They exited the State vehicle. Grievant met his Wife and gave her money. Grievant's Wife offered to give the three men a tour of a portion of the facility. The three men toured the plant which took approximately 15 minutes. They returned to the State vehicle and drove to the sinkhole area. The men left the sinkhole, went to the DOC Facility, and returned to the sinkhole in approximately 30 to 35 minutes.

The Crew Leader drove the State vehicle to another job site where another Agency crew was cleaning up the site.

There was some discussion among the men about taking a lunch break. The Crew Leader said he wanted to go to Burger King because "I like Burger King." Grievant agreed to go to Burger King. Mr. S did not care where they went because he usually did not "go into places like that" and remained in the truck to eat his lunch. The Crew Leader drove the State vehicle to the Burger King. The Crew Leader went inside Burger King. Grievant went into the Burger King a few minutes later. Mr. S remained with the State vehicle. Mr. S left the State vehicle and went inside a local Grocery Store to use the restroom. Mr. S returned to the State vehicle. Grievant and the Crew Leader remained in Burger King for approximately 30 minutes. Once the Crew Leader and Grievant returned to the State vehicle, they travelled to other job sites and ultimately returned to the headquarters to end their shifts.

Work crews typically do not receive 15 breaks in the morning and in the afternoon. They receive a 30 minute lunch break. The Crew Leader, however, had discretion to take 15 minute breaks.

The Agency issued the Crew Leader and Mr. S Group I Written Notices.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>1</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Abuse of State time is a Group I offense.<sup>2</sup> On May 22, 2018, Grievant took two lunch breaks. He did not complete a leave form to account for the additional break. Grievant was responsible for taking two lunch breaks because he asked the Crew Leader to leave the sinkhole location to go to the DOC Facility because he had an emergency. At 5:30 a.m., Grievant knew his Wife needed gas money. He could have left his home and travelled to the DOC Facility to provide his Wife with money for gas prior to arriving to work. Instead, Grievant told the Crew Leader he had an emergency and needed to visit his Wife at the DOC Facility. Grievant’s Wife did not have an emergency at the time Grievant told the Crew Leader an emergency existed. The Crew Leader acted in response to Grievant’s false claim. The Agency has presented sufficient evidence to justify issuance of a Group I Written Notice for abuse of State time.

Grievant argued that his Wife faced an emergency and he needed to respond since the crew was close to the DOC Facility where his wife worked. Grievant’s claim of there being an emergency is not persuasive because if emergency circumstances existed at 11:20 a.m., those circumstances also existed at 5:30 a.m. when Grievant learned his wife needed money to pay for gas. If needing money for gas was an emergency, then the emergency existed at 5:30 a.m. yet Grievant ignored that emergency and went to work.

Grievant argued that it was more efficient for the crew to go to the DOC Facility from the sinkhole than to drive from the sinkhole back to the headquarters and then drive to the DOC Facility. It may have been more efficient to do this, but it would not justify Grievant taking an additional break.

*Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management ....”<sup>3</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the

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<sup>1</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>2</sup> See, Attachment A, DHRM Policy 1.60.

<sup>3</sup> *Va. Code § 2.2-3005.*

agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer